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No. 97-1235

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF MONTEREY,
Petitioner,
v.
DEL MONTE DUNES AT MONTEREY, LTD. and MONTEREY-DEL MONTE DUNES CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Amici will address the following question:

Whether there is a right to a jury trial on a regulatory takings/inverse condemnation claim brought in federal court under 42 U.S.C. § 1983.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local gov-

ernments. One of the principal functions of state and local governments is land use regulation. The procedures used in judicial challenges to land use decisions are thus of fundamental importance to *amici* and their members.

The court of appeals' holding that a jury properly decided the City of Monterey's liability for a regulatory taking is a serious error that is contradicted by hundreds of years of practice and precedent. As one authority explained shortly after the enactment of 42 U.S.C. § 1983, "[c]ondemnation is not an action at law, but an inquisition on the part of the state for the ascertainment of a particular fact, and may be conducted without the intervention of a jury." Henry E. Mills, *A Treatise Upon The Law Of Eminent Domain* § 91, at 121 (1879). The court of appeals' additional holding that the district court properly submitted to the jury the question of whether the city's actions substantially advanced a legitimate government interest reflects a fundamental misunderstanding of the role of courts in reviewing the actions of state and local legislative and administrative bodies.

Because of the importance of these issues to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.[1]

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

A. Regulatory takings/inverse condemnation claims, like eminent domain claims, are not actions at law in which there is a right to a jury trial. "Condemnation is not an action at law, but an inquisition on the part of the state for the ascertainment of a particular fact, and may be conducted without the intervention of a jury." Henry E. Mills, *A Treatise Upon The Law Of Eminent Domain* § 91, at 121 (1879). Such proceedings derive from the writ *ad quod damnum*, which was issued by courts of equity to the sheriff to conduct an inquest into the amount of damages incurred by a landowner as a result of a taking.

It has thus long been the rule that there is no right, in the absence of statute, to a jury trial in an eminent domain action. This rule applies to the determination of both liability and damages. Moreover, it applies regardless of whether the condemning authority is a sovereign or a non-government entity such as a railroad or utility that has been granted eminent domain powers.

The similarities between eminent domain and inverse condemnations actions compel the conclusion that there is no right to a jury trial on a regulatory takings claim. The right to bring a regulatory takings claim is "based on the right to recover just compensation for property taken by the [sovereign] for public use in the exercise of its power of eminent domain. . . . The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners [does] not change the essential nature of the claim." *First English Evan. Luth. Church v. Los Angeles Cty.*, 482 U.S. 304, 315 (1987) (citation omitted).

Inverse condemnation actions have traditionally sought such equitable relief as compelling the government to condemn the property or enjoining the enforcement of police power regulations. And an inverse condemnation action which seeks monetary relief for a temporary taking bears a strong resemblance to the equitable remedies of restitution and accounting for rents. There is, of course, no right to a jury trial in these equitable proceedings. Whether the proceeding is initiated by the condemnor or landowner does not alter its fundamental nature, which is not an action at law, but a special proceeding of equitable origin in which the court has a duty to see that the estimates made "are just, not merely to the individual whose property is taken, but also to the public, which is to pay for it." *Searl v. School Dist. No. 2*, 133 U.S. 553, 562 (1890).

B. The court of appeals erred in concluding that the question of whether "the City's actions substantially advanced a legitimate public purpose" is so "essentially factual" that it should be decided by a jury. The court's conclusion demonstrates a fundamental misunderstanding of the relative roles of courts and juries in constitutional adjudication.

Contrary to the court's reasoning, this question embraces a predictive judgment about the efficacy of the government's chosen means of achieving a particular end. The Constitution commits these judgments to legislative and administrative bodies, as this Court's cases have long made clear. As the Court has explained, "neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted" for the legislature's judgment. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). The deferential standards of review

which courts apply in reviewing administrative action likewise demonstrate that juries have no role in assessing the validity of these predictive judgments.

The Court's cases interpreting the Takings Clause's "public use" requirement reinforce the conclusion that juries have no role in assessing whether a land use regulation substantially advances a legitimate government purpose. "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). If courts are not to engage in "empirical debates over the wisdom of takings," *id.* at 243, juries should not be empowered to engage in empirical debates over the efficacy of land use regulations.

ARGUMENT

THERE IS NO RIGHT TO A JURY TRIAL ON A REGULATORY TAKINGS/INVERSE CONDEMNATION CLAIM BROUGHT IN FEDERAL COURT UNDER 42 U.S.C. § 1983

The court of appeals erroneously held that the district court properly submitted to the jury the issue of whether the City was liable for a regulatory taking of Del Monte's property. The court's holding that Del Monte was entitled to a jury trial on its regulatory taking/inverse condemnation claim because "plaintiffs who bring an action at law under Section 1983 have the right to a jury trial," Pet. App. 7a-8a, rests on two flawed premises—that an inverse condemnation claim is an action at law, and that the nature of the remedy sought dictates whether the issue of liability is to be decided by a common law jury.

As explained below, there is no right to a jury trial in the analogous eminent domain proceeding. Con-

trary to the reasoning of the court of appeals, this rule is not the consequence of the United States' sovereign immunity. Rather, it is the result of the long-standing recognition that such cases, which derive from the equitable writ *ad quod damnum*, are "of a special and peculiar nature," *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959), and are not cases in which trial by jury is a matter of right. Courts have thus denied jury trials not only when the United States has been a party but also when such non-governmental entities as utility companies have exercised the power of eminent domain.

Nor was the court of appeals on any firmer ground in reasoning that Del Monte was entitled to a jury trial because it sought as relief "compensatory or 'legal' damages." Pet. App. 9a. To the extent this is even relevant in assessing whether the issue of liability in a regulatory takings case is for the jury, a long tradition exists of courts assigning the task of determining the adequacy of compensation to bodies other than the common law jury. Moreover, in eminent domain proceedings, courts, rather than juries, have long determined such questions as whether a taking is for a public purpose, an issue which is analogous to the question of liability in a regulatory takings action. The judgment of the court of appeals should therefore be reversed.

A. Eminent Domain And Regulatory Takings/Inverse Condemnation Claims Are Not Actions At Law

1. The court of appeals correctly observed that 42 U.S.C. § 1983 "is silent with respect to whether plaintiffs have a right to a jury trial in actions brought pursuant to it." Pet. App. 7a. The court reasoned that because Section 1983's text "[m]irror[s] the split

then existing between courts of law (trial by jury) and courts of equity (bench trial)," and "section 1983 gives aggrieved parties the right to bring an 'action at law' or a 'suit in equity,'" it "logically" follows that "plaintiffs who bring an action at law under section 1983 have the right to a jury trial." *Id.* at 7a-8a.

Contrary to the court of appeals' reasoning, Section 1983 does not provide aggrieved parties with only the remedies of "an action at law" or "suit in equity." 42 U.S.C. § 1983. Rather, it provides the remedies of "an action at law, suit in equity, *or other proper proceeding for redress.*" *Id.* (emphasis added). The inevitable consequence of the court's ignoring the existence of this third category of remedies was its conclusion that eminent domain and inverse condemnation actions must be actions at law which are triable to a jury because property owners customarily seek monetary relief. *See* Pet. App. 9a. The court of appeals' holding ignores the history and accepted understanding of the nature of eminent domain proceedings and two centuries of practice to the contrary.

This Court has recognized that "[a]lthough an eminent domain proceeding is deemed for certain purposes of legal classification a 'suit at common law,' it is of a special and peculiar nature." *Thibodaux*, 360 U.S. at 28 (quoting *Kohl v. United States*, 91 U.S. 367, 375-76 (1875)). Indeed, as a leading authority explained shortly after the enactment of Section 1983, eminent domain proceedings derive from the writ *ad quod damnum*, which was issued by courts of equity to the sheriff to conduct an inquest into the amount of damages incurred by a landowner as a result of a taking. *See* Henry E. Mills, *A Treatise Upon The Law Of Eminent Domain* § 84, at 111 (1879); *see also* 2 Nichols, *The Law Of Eminent*

Domain § 4.105[1], at 4-107 (Julius L. Sackman ed., rev. 3d ed. 1990); 6 *id.* § 24.06[1], at 24-28 - 24-29 ("The statutory system of condemnation by judicial decree prevailing in the great majority of states has grown and developed out of the early *ad quod damnum* proceedings. . . ."); *Custiss v. Georgetown and Alexandria Turnpike Co.*, 10 U.S. (6 Cranch) 233 (1810); *Lewis v. Du Pont*, 22 A.2d 832, 834 (Del. Super. Ct. 1941); *Lake Bowling Alley v. City of Richmond*, 82 S.E. 97, 99 (Va. 1914); *Jacksonville, T. & K. W. Ry. Co. v. Adams*, 11 So. 169, 171 (Fla. 1982).[2] That issuance of this writ was the province of courts of equity belies the Ninth Circuit's suggestion, Pet. App. 8a, that eminent domain proceedings "are actions at law."[3]

Rather, eminent domain proceedings "are special proceedings for the exercise of public powers." Carman F. Randolph, *The Law Of Eminent Domain In*

[2] *See also* 1 Nichols, *Eminent Domain* § 1.22[1], at 1-78—1-79 ("[I]t is apparent that the whole system of exercising eminent domain in the American colonies was influenced to a considerable extent by the English practice of inquest by a jury, and in many colonies the writ of *ad quod damnum* was used, *eo nomine*, and continued to be so used long after the Revolution.").

Inquest juries are not the same as common law juries and are not subject to the same rules as common law juries. *See Bauman v. Ross*, 167 U.S. 549, 592-93 (1897); *see also Hamer v. School Bd.*, 393 S.E.2d 623, 627 (Va. 1990); *Baltimore Belt R.R. Co. v. Baltzell*, 75 Md. 94, 106-08 (1891); *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45, 75-76 (N.Y. Ch. 1831).

[3] The *Kohl* opinion states that "[t]he right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute." 91 U.S. at 376. The *Kohl* dictum cites no authority for this statement, which is at odds with the numerous authorities cited above.

The United States § 314, at 288 (1894). "Condemnation is not an action at law, but an inquisition on the part of the state for the ascertainment of a particular fact, and may be conducted without the intervention of a jury." Mills, *Eminent Domain* § 91, at 121. This is so, as the Court has explained, because "[i]t is the duty of the state to see that the estimates made are just, not merely to the individual whose property is taken, but also to the public, which is to pay for it." *Searl v. School Dist. No. 2*, 133 U.S. 553, 562 (1890); *see also* Mills, *Eminent Domain* § 84, at 111 (citing *Garrison v. New York*, 88 U.S. (21 Wall.) 196 (1874)).

It has thus long been the rule that

> the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury.

Bauman, 167 U.S. at 593. *See also* II James Kent, *Commentaries on American Law* *339 note *e* (O. W. Holmes, Jr. ed., 12th ed. 1873) ("The damages may be assessed in any equitable and fair mode, to be provided by law, without the intervention of a jury, inasmuch as trial by jury is only required on issues of fact, in civil and criminal cases in courts of justice."); Mills, *Eminent Domain* § 85, at 112-13 (value of property can be assessed by "a jury, or commissioners, or [a] court without a jury"); 6 Nichols, *Eminent Domain* § 24.06, at 24-27 ("the amount of compensation to which each owner is entitled is determined by commissioners or by a jury as

the local constitution or statute requires") (footnote omitted). *Cf. Custiss*, 10 U.S. (6 Cranch) at 233 (describing early federal statute using writ *ad quod damnum*).

This remains the rule today. Thus, under Fed. R. Civ. P. 71A(h), "[i]f the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue." While in the absence of a "specially constituted tribunal any party may have a trial by jury of the issue of just compensation," the court may in its discretion order that "the issue of compensation shall be determined by a commission of three persons appointed by it." *Id.; see also United States v. Reynolds*, 397 U.S. 14, 18 (1970); Jacques B. Gelin & David W. Miller, *The Federal Law of Eminent Domain* 436-41 (1982). That to this day the federal rules allow for the issue of just compensation to be decided by bodies other than a common law jury demonstrates that eminent domain proceedings are not actions at law.[4]

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[4] As one commentator observes, the early federal eminent domain statutes reflect a great "diversity in methods of assessment." Paxton Blair, "Federal Condemnation Proceedings And The Seventh Amendment," 41 Harv. L. Rev. 29, 37 (1927). Describing these statutes, Blair notes:

> Thus we find, in close succession, provisions for assessment by a jury of twenty-three, by twelve freeholders, by not less than twelve jurymen out of a panel of twenty-four, and by not less than seven out of twelve, while we likewise find, all within the same decade, provisions in no less than four different statutes for reference of the assessment to three commissioners or a majority of them.

Id. at 37 (footnotes omitted). He concludes that "the common law sanctioned such diverse methods of assessment that no one method can be said to have been made imperative by the Seventh Amendment." *Id.* at 36.

As Mills further explained contemporaneously with the enactment of Section 1983:

> The persons appointed to assess damages in cases of this kind do not perform the proper and usual functions of a jury . . . . Juries are for the trial of issues of fact in civil and criminal proceedings in courts of justice, and are not necessarily required in the assessment of land-damages. . . . The right to trial by jury is not claimed in equity cases, although rights of property are involved and issues of fact arise. Condemnation is not an action at law, but an inquisition on the part of the state for the ascertainment of a particular fact, and may be conducted without the intervention of a jury.

Mills, *Eminent Domain* § 91, at 120-21; *see also* II Kent, *Commentaries* at *339 note *e*.

If juries are not constitutionally required to adjudicate the issue of just compensation in an eminent domain proceeding, it is even more remarkable to suggest they have a role in determining whether the government is liable for a taking in the first place. Notable in this regard is Federal Rule 71A(h), which further provides that the "[t]rial of all issues shall otherwise be by the court." Fed. R. Civ. P. 71A(h). The latter provision is in keeping with longstanding practice. Even when a party is entitled to trial by jury on the issue of just compensation, "[i]t is generally the province of the court to determine the preliminary questions of the right to condemn, whether the use is a public one, and the necessity of [the] taking." 20 Corpus Juris *Eminent Domain* § 381, at 974-75 (1920) (footnotes omitted). *See also*

Randolph, *Eminent Domain* § 322, at 294-95 ("A strict limitation usually imposed upon these tribunals is that they are not competent to pass upon questions of law. . . . A jury, whose sole duty is to assess compensation, [is] not competent to decide whether or not the construction of the undertaking is duly authorized.")[5] As these authorities demonstrate, there is no right to a jury trial on liability issues in eminent domain proceedings and there is no basis to conclude that Section 1983 confers such a right.[6]

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[5] A current statement of the rule is found in 27 Am. Jur. 2d *Eminent Domain* § 617, at 163-64 (1996) (footnotes omitted):

> Generally, the court has the duty to determine such issues as the condemnor's legal authority to take and the limits thereon, the purpose of the taking, the necessity and expediency of the taking, and questions of title. Accordingly, a landowner has no constitutional right to be heard by a jury on the validity of a taking, as this issue presents a question of law for the court. Similarly, the landowner is not entitled to a jury determination of the public necessity of the proposed taking. The threshold question of liability for unreasonable or unlawful precondemnation conduct is to be determined by the court.

See also 2 Nichols, *Eminent Domain* § 4.105[5], at 4-119.

[6] The result is no different under the Seventh Amendment. As this Court has held:

> "The practice in England and in the colonies prior to the adoption in 1791 of the Seventh Amendment, the position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment, and the position taken by the Supreme Court and nearly all of the lower federal courts lead to the conclusion that there is no constitutional right to jury trial in the federal courts in an action for the condemnation of property under the power of eminent domain."

Reynolds, 397 U.S. at 18 (quoting 5 J. Moore, *Federal Practice* ¶ 38.32[1], at 239 (2d ed. 1969)). And as explained *infra*, both the similarities between eminent domain and inverse condemnation proceedings and the nature of regulatory takings actions compel the conclusion that there is no right to a jury trial on liability issues in such proceedings.

2. The court of appeals ignored the extensive authority demonstrating that eminent domain proceedings derive from the equitable writ *ad quod damnum* and are special and unique proceedings rather than actions at law in which there is a right to a jury trial. Instead, the court asserted that eminent domain "proceedings are not tried before a jury because the United States traditionally is a party." Pet. App. 8a (citing *KLK, Inc. v. U.S. Dep't of Interior*, 35 F.3d 454, 456 (9th Cir. 1994)). This is wrong for several reasons.

First, the court of appeals' assumption that the unavailability of a jury trial in eminent domain proceedings stems from sovereign immunity principles ignores that such principles do not control when the United States initiates a condemnation proceeding. Indeed, if the court of appeals is correct, then Rule 71A(h)'s provision that "if there is no [statute authorizing a] specially constituted tribunal any party may have a trial by jury of the issue of just compensation" would stand in contrast to the longstanding rule that only Congress can waive the United States' sovereign immunity. *See, e.g., Stanley v. Schwalby*, 162 U.S. 255 (1896); *Kendall v. United States*, 38 U.S. (12 Pet.) 524 (1838).[7]

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[7] Indeed, it is settled that when the United States initiates a suit at common law the Seventh Amendment applies. *See Tull v. United States*, 481 U.S. 412, 420 (1987).

Second and most significantly, the court of appeals has ignored the long tradition of sovereigns granting the power of eminent domain to both municipal corporations and non-governmental entities such as railroads, highway companies, and utilities. Such entities do not enjoy sovereign immunity. *See, e.g., Lincoln County v. Luning*, 133 U.S. 529 (1890); *cf. Wilson v. United States*, 221 U.S. 361 (1910). Yet they frequently exercised the eminent domain power in proceedings in which there was no right to a jury trial. *See Alabama Power Co. v. 1354.02 Acres of Land*, 709 F.2d 666, 667-68 (11th Cir. 1983); *Georgia Power Co. v. 138.30 Acres of Land*, 596 F.2d 644, 647-50 (5th Cir. 1979); *see also Custiss v. Georgetown and Alexandria Turnpike Co.*, 10 U.S. (6 Cranch) at 233-34; *Baltimore Belt R.R. Co. v. Baltzell*, 75 Md. 94, 107 (1891) (noting that "as to railroads, the [Maryland] Legislature [has] without exception, provided that the compensation should be awarded by a special jury" summoned by warrant rather than a common law jury); *Bailey v. Philadelphia, Wilm. & Balt. R.R. Co.*, 4 Del. (4 Harr.) 389, 390-91 (1846); *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45, 75 (N.Y. Ch. 1831). As these authorities demonstrate, the reason eminent domain proceedings are tried without juries is not "because the United States [or some other sovereign] traditionally is a party." Pet. App. 8a. Rather, it is because eminent domain proceedings derive from the writ *ad quod damnum*, which was the province of courts of equity where there is no right to a jury trial.

3. The equitable pedigree of eminent domain proceedings demonstrates the court of appeals' error in reasoning that "the similarities between eminent domain and inverse condemnation suggest that the latter derives from common law." Pet. App. 9a. The court, however, syllogized that inverse condemnation suits are actions at law because they are similar to eminent domain proceedings, which "ha[ve] been characterized as a 'trespass committed by the sovereign,'" and "[a]ctions brought for trespass are common-law actions." *Id.* at 9a (quoting *Beatty v. United States*, 203 F. 620, 626 (4th Cir. 1913), *cert. denied*, 232 U.S. 463 (1914)).

The court's syllogism is correct only in its recognition that eminent domain and inverse condemnation proceedings are similar; indeed, its analysis ought to have stopped there. Moreover, the court's analogy to trespass actions ignores a critical difference between eminent domain proceedings and regulatory takings—that the common law action of trespass requires a physical invasion of the land which interferes with possession. *See* W. Page Keeton, *et al., Prosser and Keeton on The Law Of Torts* § 13, at 67-73 (5th ed. 1984). While a physical invasion necessarily occurs when the power of eminent domain is exercised—it is, after all, the very point of exercising the power—no invasion occurs when the government merely regulates the use of land.[8]

The court's further assertion that "eminent domain and inverse condemnation actions resemble common-

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[8] The court of appeals' characterization of eminent domain proceedings as a "trespass by the sovereign" is contradicted by a leading commentator. *See* II Kent, *Commentaries* *399 note *j* ("[I]t is not to be understood that a statute assuming private property for public purposes, without compensation, is absolutely void, so as to render all persons acting in execution of it trespassers.").

law actions for trover to recover damages for conversion of personal property, and detinue and replevin," Pet. App. 9a, is also incorrect. First, it is hard to understand how eminent domain proceedings resemble these actions given that the entity seeking to condemn property ordinarily initiates the proceeding.

Nor is the court's analogy any more persuasive with respect to inverse condemnation proceedings. Courts of equity have long exercised broad jurisdiction over disputes involving real property through such actions as a suit to quiet title and a suit for specific performance. *See* J. Moore, *Federal Practice* § 38.10[3][a][iii] (3d ed. 1998). Both of these equitable actions bear a far greater resemblance to inverse condemnation proceedings which assert that a land use regulation effects a taking of property than to common law actions involving chattels.

The purpose of most inverse condemnation actions is, after all, to compel the government either to condemn the property or to rescind a regulation. Compelling government action—whether it be to condemn property or to rescind a regulation—is typically obtained through the equitable remedy of an injunction. Moreover, as a practical matter, compelling the government to condemn property results in it becoming the owner of the property in return for paying compensation. In a dispute between private parties, such relief is traditionally obtained through a suit in equity for specific performance. And even an inverse condemnation action which seeks only monetary relief for a temporary taking bears a strong resemblance to the equitable remedies of restitution and accounting for rents. *See* I Joseph Story, *Commentaries On Equity Jurisprudence* 508-09 (12th ed.

1984); *see also Tull v. United States*, 481 U.S. at 424.

The court of appeals' suggestion that inverse condemnation actions "derive[] from [the] common law," Pet. App. 9a, is hard to square with the accepted understanding of the nature of these proceedings. As the Court itself has long recognized, the right to bring an inverse condemnation action is "based on the right to recover just compensation for property taken by the [sovereign] for public use in the exercise of its power of eminent domain. . . . The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim." *First English Evan. Luth. Church v. Los Angeles Cty.*, 482 U.S. 304, 315 (1987) (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)).

And as one treatise explains in describing the practice throughout the States:

> 'Inverse condemnation' is the popular description of the cause of action against a governmental defendant to recover value of property taken in fact by the defendant even though no formal exercise of the power of eminent domain has been attempted. The three methods by which the owners of real property seek to compel an assessment of damages in the same manner as in condemnation proceedings without resort to condemnation proceedings are by injunction, certiorari, and mandamus.

Irving L. Levey, *Condemnation in U.S.A.* § 44, at 455 (1969) (footnote omitted); *see also* 3 Nichols, *Eminent Domain* § 8.01[4][a], at 8-39 ("Traditionally, an [inverse condemnation] attack upon police power legislation sought merely declaratory relief by way

of an adjudication of invalidity, and equitable relief by way of an injunction against its enforcement, or both."); II Kent's *Commentaries* at *339 note *f* ("if the government proceed without" providing compensation or a tribunal for assessing compensation, "their officers and agents may and ought to be restrained by injunction"); *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816); *cf. Lewis v. Du Pont*, 22 A.2d at 834 (noting owner's remedy of writ *ad quod damnum*); *Bailey*, 4 Del. (4 Harr.) at 9 (same).

There is, of course, no right to a jury trial in these proceedings. And contrary to the reasoning of the court of appeals, the similarities between eminent domain and inverse condemnation actions suggest that whether the proceeding is initiated by the condemnor or the landowner does not alter the fundamental nature of the proceeding, which is not an action at law. Rather, it is a special proceeding of equitable origin in which the court has a duty to see that the estimates made "are just, not merely to the individual whose property is taken, but also to the public, which is to pay for it." *Searl v. School Dist. No. 2*, 133 U.S. 553, 562 (1890); *see also* Mills, *Eminent Domain* § 84, at 111 (citing *Garrison v. New York*, 88 U.S. (21 Wall.) 196 (1874)).

4. The court of appeals also reasoned that "Del Monte was entitled to have a jury try its inverse condemnation claim" because it asserted "legal rights" and sought "'legal' damages." Pet. App. 9a (citations omitted). But as explained above, it is hard to view the requirement of providing "just compensation" for taking property as a legal right or the compensation as legal damages when this right was traditionally enforced by seeking the equitable writ of *ad quod damnum*. That to this day there is no right to a jury trial in an eminent domain proceeding further demonstrates that the right to just compensation is equitable and not legal in nature. As a leading authority explains, "[w]hile an action seeking a monetary award will frequently be legal in nature, when a monetary claim is made in a context historically allowed in equity rather than at law, it will not be triable to a jury." J. Moore, *Federal Practice* § 38.10 [3][a][ii], at 38-45 (citations omitted).

B. Whether A Land Use Regulation Substantially Advances A Legitimate Government Interest Is A Question Of Law Which Is Outside The Province Of The Jury

The court of appeals also erred in concluding that the question of "whether the City's actions substantially advanced a legitimate public purpose," Pet. App. 12a, is so "essentially factual" that "it is the type of issue that can be put to the jury." *Id.* at 15a (citation omitted).[9] The court's conclusion demonstrates a fundamental misunderstanding of the relative roles of court and jury in constitutional adjudication which has grave implications for the review of the actions of state and local government legislative and administrative bodies.

1. The Court has said that the determination of whether "regulation goes too far" so as to be a taking, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), involves "'essentially ad hoc, factual inquiries.'" *Lucas v. South Carolina Coastal*

[9] *Amici* agree with petitioner's other *amici* that this is not the proper test for determining whether land use regulation effects a taking.

Council, 505 U.S. 1003, 1015 (1992) (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). But, contrary to the view of the court of appeals, this language hardly "points . . . toward the use of the jury" to resolve the question of whether a government regulation substantially advances a legitimate government interest. To say that an inquiry is "essentially factual" does not address whether resolution of a particular prong of one of the Court's formulations for determining whether a regulatory taking has occurred is factual in nature.

Nor does it answer the question of whether the "facts" necessary to resolve a particular inquiry are adjudicative in nature and thus must presumably be found by a jury. *Cf.* II Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 10.6, at 152-53 (1994) (discussing distinction between "adjudicative facts," which are " 'facts concerning immediate parties,' " and "legislative facts," which " 'are utilized for informing a court's legislative judgment on questions of law and policy' ") (citation omitted). Indeed, this Court has a long tradition of taking judicial notice of legislative facts in constitutional litigation. *See id.* at 154-55; *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938).

The court of appeals correctly noted that whether the government has a legitimate government purpose is "a legal determination." Pet. App. 14a. The court went astray, however, in reasoning that the issue of whether "the City's actions substantially advanced a legitimate state interest"—which it deemed to be a "reasonableness determination," *id.*—was "essentially factual" and thus "the type of issue that can be put to the jury." *Id.* at 15a.

The court's conclusion that a jury is properly charged with the duty to assess the constitutional adequacy of the nexus between the means government has chosen and the end it seeks rests on several flawed premises. The first of these is that "the reasonableness issue in this case is essentially 'fact-bound [in] nature.' " *Id.* (quoting *United States v. Moreno*, 742 F.2d 532, 537 (9th Cir. 1984) (Wallace, J., concurring)). *Moreno*, which involved the issue of whether an arrest was based on probable cause and thus "reasonable" under the Fourth Amendment, *see* 742 F.2d at 534-36, provides no authority for the court's assertion.

Legal concepts such as reasonableness are terms of art which derive their meaning from context. Even in the realm of the Fourth Amendment, whether the issue of reasonableness is essentially legal or factual in nature cannot be answered without reference to its context. For example, the Court's determination that it is unreasonable to shoot an unarmed, nondangerous felony suspect—a determination which the Court made by " 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion,' " *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (citation omitted)—is indisputably a question of law which a jury is not competent to decide. *Cf. Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) ("whether [secret service] agents acted reasonably under settled law in the circumstances" and are entitled to qualified immunity should be decided by the court and not a jury).

Indeed, whether the denial of a permit substantially advances (or as the lower courts put it, is reasonably

related to) the acknowledged governmental interests in " 'protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community,' " Pet. App. 13a (quoting district court's jury instructions), embraces a predictive judgment about the efficacy of the government's chosen means of achieving a particular end. Jurors bring no special expertise to this issue.[10] Rather, the Constitution commits these judgments to legislative and administrative bodies, as the Court made clear as early as *Pennsylvania Coal*:

> One fact for consideration in determining [the] limits [of the police power] is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power.

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[10] Among the stranger statements in the court of appeals' opinion is its assertion that "the reasonableness issue in this case . . . is founded largely 'on the application of the fact-finding tribunal's experience with the mainsprings of human conduct." Pet. App. 15a (quoting *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960)). The court's statement might be understandable if the jury had been instructed that it could disregard the City's assertions if it deemed them to be pretextual. But the instructions given prohibited the jury from considering the motives of the city council members. The only issue the jurors were allowed to consider was whether the regulation advanced the City's legitimate interests. At bottom, this is an inquiry into the validity of a predictive judgment and not a question of fact.

260 U.S. at 413. And the Court later explained:

> "If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts."

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 393 (1926) (quoting *State v. City of New Orleans*, 97 So. 440, 444 (La. 1923)).

Because " 'debatable questions as to reasonableness are not for the court but for the Legislature,' " *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962) (quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932)), juries obviously have no role to play in assessing the "reasonableness" of legislative means. As the Court has explained:

> [W]here the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. . . . [N]either the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

United States v. Carolene Products, 304 U.S. at 154; *see also Atlantic & Pacific Telegraph Co. v. City of Philadelphia*, 190 U.S. 160, 166 (1903) (quoting 1 Dillon, *Municipal Corporations* § 327 (4th ed.) (" 'Whether an ordinance be reasonable and consistent with the law or not *is a question for the court*, and

not the jury, and evidence to the latter on this subject is inadmissible.' ")).

2. Notwithstanding the similarity between this inquiry and the substantive due process standard of review, the court of appeals rejected as unhelpful the City's argument that in determining whether there is a right to a jury trial on this issue, it "analogize this inquiry to that undertaken by courts addressing substantive due process claims." Pet. App. 12a. Instead, the court declared that "referring to eminent domain and inverse condemnation cases appears to us to be a safer course." *Id.* at 13a. The court largely failed to follow this course, however, citing only one case, *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which it read as "indicat[ing] that the inquiry is essentially factual" and thus for a jury to decide. Pet. App. 15a.

This is an odd conclusion to draw from *Dolan* given that there was no jury trial at any point in the various administrative and judicial proceedings in which the case was litigated. *See* 512 U.S. at 379-83. Indeed, it is noteworthy that the factual findings which the *Dolan* Court found insufficient to support the City's dedication requirement were made by the City's planning commission, an administrative agency with substantial expertise, and not by a common law jury. As a general matter, when courts review orders of an administrative agency they are required to give the agency's factual findings broad deference. II Davis & Pierce, *Administrative Law Treatise* § 11.2, at 174. Notably, *Dolan* says nothing that even remotely suggests that the issue of whether a land use regulation substantially advances a legitimate government interest is within the competence of a common law jury. Courts are quite capable of resolving the constitutionality of agency orders and regulations on the basis

of an administrative record. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837-42 (1987) (holding unconstitutional, on basis of agency record, permit condition imposed by land use planning agency because it was irrational). Indeed, as *Nollan* demonstrates, whether a permit condition substantially advances a legitimate government interest is a question of law that the court decides.

This Court's cases interpreting the Takings Clause's "public use" requirement reinforce the conclusion that juries have no role in assessing the validity of a land use regulation. As this Court has made clear, the federal courts' role "in reviewing a legislature's judgment of what constitutes a public use . . . is 'an extremely narrow' one." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)). The Court accordingly "will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' " *Id.* at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

Thus, "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* (citations omitted). This is so even though a regulation "may not be successful in achieving its intended goals." *Id.* at 242. As the Court has further explained

> "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." When

> the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings —no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.

Id. at 242-43 (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)) (other citations omitted).

The Court's circumscription of the scope of judicial inquiry in eminent domain proceedings highlights the inappropriateness of submitting to a jury the analogous question of whether a land use regulation substantially advances a legitimate government interest. If courts are not to engage in "empirical debates over the wisdom of takings," *id.*, juries cannot be empowered to engage in empirical debates over the efficacy of land use regulations. Rather, the limited judicial inquiry which the takings clause contemplates with respect to the rationality of government action, whether it be for purposes of formal condemnation proceedings or for land use regulation, is a question of law which the court must decide. The court of appeals erred in failing to recognize as much.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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